89-1744

Supreme Court, U.S.
FILED
MAY 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1989

LAVERNA S. BISHOP, personal representative and sole surviving heir, for the estate of ALAN H. BISHOP,

Plaintiff-Petitioner,

v.

UNITED STATES OF AMERICA,

Defendant-Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether an application of the Ninth Circuit's interpretation of the *Dalehite*[1] doctrine or an application of the District of Columbia Circuit's interpretation of the *Berkowitz*[2] doctrine is appropriate to determine whether the Veterans Administration's issuance and application of Department of Veterans Benefits Circular 21-82-9 (1982) fell under the "discretionary function" exception to the Federal Tort Claims Act under 28 U.S.C. § 2680(a) (1982 & Supp. V 1987), when the issuance of the circular was contrary to a number of procedural safeguards, enacted by Congress under 38 U.S.C. § 210(c) (1982), restricting the authority of the Veterans Administration to issue such circulars, and when the substantive provisions of the circular were contrary to the Veterans Administration's own rules and regulations under 38 C.F.R. §§ 1.12, 3.327(b)(2), 3.343(a), (c) and 4.132 (1989).

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[1] *Dalehite v. United States*, 346 U.S. 15, 43 (1953)(adoption of regulations by a government agency is "classically within the ['discretionary function'] exception" to the FTCA)

[2] *Berkowitz v. United States*, 486 U.S. 531 (1988)(Section 2680(a) "does not bar claims based upon a governmental departure from clear regulatory standards")

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## REPORTS OF OPINIONS

*Bishop v. United States*, No. 88-4040 (9th Cir., August 25, 1989; not for publication).

## JURISDICTIONAL GROUNDS FOR CERTIORARI

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982 & Supp. V 1987). The date of the entry of Judgment in this action was on August 25, 1989, and the date of the Order respecting rehearing was on February 8, 1990.

## CITATION OF AUTHORITIES

### CONSTITUTIONS

U.S. Const. amend. V

### STATUTES

5 U.S.C. § 552(a) (1988)

5 U.S.C. § 553 (1988)

5 U.S.C. § 706(2)(A)(1988)

28 U.S.C. § 2680(a) (1982 & Supp. V 1987)

38 U.S.C. § 210(c) (1982)

38 U.S.C. § 359 (1982 & Supp. V 1987)

### REGULATIONS

38 C.F.R. § 1.12 (1988)

38 C.F.R. § 3.327(b)(2) (1988)38 C.F.R. § 3.343(a) (1988)

38 C.F.R. § 3.343(c) (1988)

38 C.F.R. § 4.132 (1988)

### CIRCULARS

Department of Veterans Benefits Circular 21-82-9 (1982).

## STATEMENT OF THE CASE

### SUBSTANTIVE FACTS

Mr. Bishop served honorably in the United States Navy during World War II, and the Navy decorated him for service in the battles of Guadalcanal, the Santa Cruz Islands and the Coral Sea. The Navy discharged Mr. Bishop on December 19, 1944, due to a psychoneurotic condition.

The Veterans Administration determined on September 3, 1946, that Mr. Bishop was entitled to service connected benefits for his psychoneurotic condition. This determination was confirmed on October 31, 1947. On December 23, 1948, the Veterans Administration determined that Mr. Bishop's psychoneurotic condition had conversion features.

Mr. Bishop's condition deteriorated over time and by July 20, 1964, he was hospitalized for the condition. By October 9, 1964, the Veterans Administration discovered that Mr. Bishop's condition had deteriorated to the point that it was "very dangerous, in terms of suicidal potential," resulting in a determination that Mr. Bishop's rating should be increased to 50% and that Mr. Bishop was unable to work more than two

or three days a week due to a chronic and severe depressive reaction.

In February of 1968, the Veterans Administration again noted Mr. Bishop's suicidal ruminations and determined that Mr. Bishop's service connected psychoneurosis left him with marked industrial and social impairment, entitling him to a 70% schedular rating for his service connected psychoneurosis.

By November of 1969, Mr. Bishop's condition had worsened to the point that he had been unable to practice his profession for six months and his earnings had dropped from $26,150.11 per year to nothing. Hospitalization followed and the Veterans Administration diagnosed Mr. Bishop as "totally unemployable, certainly in the profession of law, from this point on."

On December 16, 1969, the Veterans Administration found that Mr. Bishop's "service related condition ha[d] increased in severity" and that he was entitled to an increase from 70% to 100% service connected disability benefits retroactive to June of 1969, due to his service connected psychoneurosis.

Throughout this time Mr. Bishop reported, as required, no employment. Mr. Bishop also suffered from a continuing heart disease, which progressively worsened.

In 1982, when Mr. Bishop was 67 years old and after Mr. Bishop had been on 100% disability for some fourteen years, the Veterans Administration subjected Mr. Bishop to the directives of D.V.B. Circular 21-82-9 on an "at once" basis and various medical examinations were illegally ordered. The only examinations pertinent to Mr. Bishop's condition were psychiatric examinations, and the examinations revealed, first, that Mr. Bishop would "not be able to resume gainful employment," and, second, that:

> "This is a severely depressed man. The symptomatic depression is merely one facet of a complex emotional problem. The implication of extreme anger combined with sadism and pleasure, the experience of aggression (as inferred and the inappropriate smiles) suggests a marked degree of instability in this person. I would be very concerned about this man's suicidal potential, and I am glad that he is on ongoing psychiatric care ...."

The psychiatrists diagnosed Mr. Bishop as a depressive neurotic with suicidal features.

Based on this record and D.V.B. Circular 21-82-9, the Veterans Administration reduced Mr. Bishop's benefits from

$1,288 per month to $610 per month, finding that Mr. Bishop, at 67 years old and not having practiced law for fourteen years, was employable in the legal field. Two psychiatrists again notified the Veterans Administration that Mr. Bishop was "totally and permanently incapacitated for engaging in gainful employment."

Mr. Bishop noted in a hearing on the matter that:

> "I can tell you one thing, gentlemen, I can tell you one thing, that there is no way that my wife can live, unless I go out and either run my car over a cliff or shoot my head off, that's my only alternative."

Mr. Bishop subsequently suffered an acute myocardial infarction. Since his benefits had been reduced, he lacked the insurance coverage he had relied upon for fourteen years, and his despair over the potential bankruptcy from his medical condition was constant. Mr. Bishop attempted to obtain Medicare benefits from the Social Security Administration, but the Medicare people determined that Mr. Bishop was not entitled to benefits because the Veterans Administration should have covered the costs due to Mr. Bishop's psychoneurotic condition. Yet the Veterans Administration again refused payment.

On May 17, 1984, Mr. Bishop committed suicide, and the Veterans Administration subsequently made a formal determination that the suicide was due to Mr. Bishop's service related psychoneurosis. On May 21, 1984, the Board of Veterans Appeals reinstated Mr. Bishop to a retroactive 100% entitlement.

**PROCEDURAL FACTS**

On August 25, 1982, the Disabled American Veterans, through Leon A. Johnson, National Service Officer, wrote Mr. Bishop that his "claim" had been rated and that he would be receiving notification from the Veterans Administration of a time to appear for an examination. On September 2, 1982, the Veterans Administration notified Mr. Bishop that he had been scheduled for an examination on October 13, 1982, at the Veterans Administration Medical Center in Portland, Oregon.

On December 1, 1982, the Veterans Administration issued a Rating Decision, jurisdictionally based on Department of Veterans Benefits Circular 21-82-9, reducing Mr. Bishop's benefits from 100% to 70%, resulting in a reduction of his benefits from $1,288 per month to $610.00 per month, effec-

tive March 1, 1983. Insurance coverage for Mr. Bishop and his wife also terminated with this reduction in benefits.

On January 14, 1983, Mr. Bishop prepared a notice of disagreement with the rating reduction with Mr. Johnson, which notice was forwarded to the Veterans Administration. On February 22, 1983, the Veterans Administration sent Mr. Bishop a Statement of the Case. On May 31, 1983, Mr. Bishop appealed the reduction in his benefits.

On June 8, 1983, for unexplained reasons, the Veterans Administration wrote Mr. Bishop and notified him that a hearing had been scheduled for a claim for increased evaluation for a service connected nervous condition. No such claim had been made. On July 26, 1983, Mr. Bishop appeared for the hearing and was represented by Mr. Gerald Christensen of the Veterans of Foreign Wars.

On October 24, 1983, the Veterans Administration sent Mr. Bishop another Rating Decision, noting that it denied his "claim" for additional compensation.

On November 3, 1983, the Veterans Administration denied medical benefits for Mr. Bishop, due to the reduction in his benefits from 100% to 70%. On February 3, 1984, Aetna

Life and Casualty Company, Medicare Claims Administration, notified Mr. Bishop that Medicare would not pay Mr. Bishop's medical bills because Mr. Bishop was "entitled to benefits under the Veterans Administration program."

On February 10, 1984, the Veterans Administration notified Mr. Bishop that his records were being referred to the Board of Veterans Appeals in relation to his appeal filed on January 20, 1982. On March 29, 1984, Mr. John J. Devlin of the Veterans of Foreign Wars presented Mr. Bishop's case to the Board of Veterans Appeals.

On May 17, 1984, Mr. Bishop committed suicide by shooting himself in the head. On May 21, 1984, the Board of Veterans Appeals reversed the reduction in Mr. Bishop's benefits and retroactively reinstated his 100% rating.

On October 11, 1984, the Veterans Administration determined that Mr. Bishop's death was service connected.

On October 31, 1985, Mrs. Bishop, acting as the representative and sole heir of Mr. Bishop's estate, filed an administrative tort claim with the Veterans Administration Office of District Counsel. On November 4, 1985, Mrs. Bishop filed an amended tort claim. On July 8, 1986, Mrs. Bishop filed a

second amended tort claim. On October 22, 1986, the Veterans Administration denied Mrs. Bishop's administrative tort claim. On March 26, 1987, Mrs. Bishop requested a reconsideration of her administrative claim. On June 18, 1987, the Veterans Administration denied Mrs. Bishop's request for reconsideration.

On December 14, 1987, Mrs. Bishop filed a Complaint under the Federal Tort Claims Act against the United States of America in the United States District Court for the District of Oregon, in Eugene, Oregon. On March 16, 1988, Mrs. Bishop filed her Amended Complaint. On April 12, 1988, the United States of America filed its motions to dismiss or, in the alternative, for summary judgment.

On July 11, 1988, the District Court allowed the United States of America's motion for summary judgment. And, on July 27, 1988, Mrs. Bishop filed her Notice of Appeal to the United States Circuit Court for the Ninth Circuit.

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## PROCEEDINGS IN WHICH THE FEDERAL QUESTIONS WERE RAISED BELOW

### 1. Jurisdiction and Questions Raised in the Trial Court

Mrs. Bishop invoked the jurisdiction of the trial court under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)-2680 (1982 & Supp. 1987).

On April 7, 1988, Mrs. Bishop filed her Documents for Motion Practice in the trial court, and on May 25, 1988, Mrs. Bishop filed her Supplemental Documents for Motion Practice.

On April 12, 1988, Defendant filed its Motion to Dismiss; or in the Alternative, Motion for Summary Judgment, contending that the action should be dismissed under either 38 U.S.C. § 211 (1982 & Supp. 1987) or 28 U.S.C. § 2680(a) (1982 & Supp. 1987). On May 4, 1988, Mrs. Bishop filed her Response to Defendant's Motions to Dismiss and for Summary Judgment with an attached and incorporated Memorandum of Law.

On page seven of her Memorandum of Law, Mrs. Bishop noted that Mr. Bishop was rated 100% schedular under 38 C.F.R. § 4.132 (1988), that Mr. Bishop was protected

from future examinations under 38 C.F.R. § 3.327(b)(2)(i)-(iv) (1988). On page eight of her Memorandum of Law, Mrs. Bishop noted that the Veterans Administration had the burden of proving by clear and convincing evidence that Mr. Bishop was actually employable and that Mr. Bishop had materially improved, in order to reduce his 100% rating, under 38 C.F.R. § 3.343(a),(c) (1988) and 38 C.F.R. § 3.340(a)(1), (2) (1988).

On page nine *et seq.* of her Memorandum of Law, Mrs. Bishop noted that the Administrator of the Veterans Administration could advance protection under 38 U.S.C. § 211 (1982 & Supp. 1987) only if it first performed within the strictures of the enabling statute, *viz.*, 38 U.S.C. § 210(c) (1982). On page ten of her Memorandum of Law, Mrs. Bishop noted that 38 U.S.C. § 211 (1982 & Supp. 1987) is to be narrowly construed. On page eleven of her Memorandum of Law, Mrs. Bishop noted that this action could not be an attempted "end run" on the strictures of 38 U.S.C. § 211 (1982 & Supp. 1987) because Mr. Bishop had not been, in the final analysis, denied benefits. On page twelve of her Memorandum of Law, Mrs. Bishop noted that established case law held

that a circular issued by the Veterans Administration had no legal efficacy unless it was published in the Federal Register. And, on page twelve of her Memorandum of Law, Mrs. Bishop noted that established case law held that the Veterans Administration is bound by its own rules and regulations.

On page twenty two of her Memorandum of Law, Mrs. Bishop noted that a failure to follow its own regulations takes the Veterans Administration outside the protections of 28 U.S.C. § 2680(a) (1982 & Supp. 1987). And, on page twenty three of her Memorandum of Law, Mrs. Bishop noted that a failure to follow its own standards takes the Veterans Administration outside the protections of 28 U.S.C. § 2680(a) (1982 & Supp. 1987).

2. **Rulings in the Trial Court**

On July 11, 1988, the trial court issued an Order stating "IT IS ORDERED that defendant's motion for summary judgment (#7) is granted."

In the attached Opinion, the trial court noted on page two that to "the extent the plaintiff's argument is that the decision on the merits was improper, that falls within the adminis-

tration of the benefits provisions and is foreclosed by § 211(a)."

In the attached Opinion, the trial court also noted on pages three and four that:

> "At issue in the instant case is Circular 21-81-9 [*sic*], issued by the Veterans' Administration, which called for review of all unemployability cases and Alan Bishop's rerating of disability made pursuant to that circular. The government contends that issuance of this circular was a discretionary act. I agree. To the extent that the plaintiff's argument is aimed at the creation of the circular, such a decision involves a discretionary act on the part of the Veterans' Administration.
>
> * * * * *
>
> "The government has established that this court lacks jurisdiction to review the Veterans' Administration's decisions at issue here by virtue of § 211(a) or the discretionary function exception. There is no genuine issue of material fact and the government is entitled to judgment as a matter of law. Therefore, I grant the government's motion for summary judgment and dismiss this action accordingly."

## 3. Jurisdiction and Questions Raised in the Ninth Circuit Court of Appeals

The United States Court of Appeals for the Ninth Circuit had *de novo* jurisdiction of Mrs. Bishop's appeal under 28 U.S.C. § 1291 (1982 & Supp. 1987) and Fed. R. App. P. 4, because the judgment appealed from was final and the Notice of Appeal was timely filed.

On page one of her Plaintiff-Appellant's Opening Brief, Mrs. Bishop noted as follows:

> "**STATEMENT OF ISSUES PRESENTED FOR REVIEW**
>
> "Did the District Court err in holding that Defendant had shown under Fed. R. Civ. Proc. 56 by clear and convincing evidence that Congress intended to foreclose judicial review of this matter under 38 U.S.C. § 211(a)[1]?
>
> "Did the District Court err in granting Defendant's Motion for Summary Judgment under Fed. R. Civ. Proc. 56 and 28 U.S.C. § 2680(a)[2] based on the 'discretionary act exception' to the Federal Tort Claims Act?"

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"[1] 38 U.S.C. § 211(a) provides that '[t]he decisions of the Administrator [of the Veterans Administration] on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.'

"[2] 28 U.S.C. § 2680(a) provides that '[t]he provisions of this chapter and section 1346(b) of this title shall not apply to -- any claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion be abused."

On pages two through seven of her Plaintiff-Appellant's Opening Brief, Mrs. Bishop outlined the course of the facts involved with Mr. Bishop and the Veterans Administration.

On pages seven through ten of her Plaintiff-Appellant's Opening Brief, Mrs. Bishop demonstrated the inconsistencies between the requirements under 38 U.S.C. § 210(c) (1982), 38 C.F.R. §§ 3.327(b)(2)(i)-(vi), 3.343(a), (c), 4.132 (1988), and the requirements under D.V.B. Circular 21-82-9.

On page ten and eleven of her Plaintiff-Appellant's Opening Brief, Mrs. Bishop argued that the trial court erred in holding that Congress intended to foreclose judicial review under 38 U.S.C. § 211(a) (1982 & Supp. 1987) when, first, D.V.B. Circular 21-82-9 had not been published in the Federal Register as required by 5 U.S.C. § 553, and when, second, D.V.B. Circular 21-82-9 directed the Veterans Administration's agents to act contrary to its own rules, regulations, and standards in Title 38 of the United States Code and the Code of Federal Regulations, and when, third, the Veterans Administration acted outside its authority under 38 U.S.C. § 210(c) (1982) in disseminating D.V.B. Circular 21-82-9, and when, fourth, Mrs. Bishop's Amended Complaint did not indirectly or otherwise seek veterans benefits denied by the Veterans Administration, since Mr. Bishop had been granted 100%

benefits and merely sought damages under the Federal Tort Claims Act for tortious conduct.

On page eleven of her Plaintiff-Appellant's Opening Brief, Mrs. Bishop noted that the trial court erred, under 28 U.S.C. § 2680(a) (1982 & Supp. 1987), in granting Defendant's Motion for Summary Judgment when, first, the failure of the Veterans Administration to follow its own rules, regulations, and standards took its decisions out of the "discretionary act exception," and when, second, the Veterans Administration's adoption of standards under Title 38 of the Code of Federal Regulations for reviewing entitlements to benefits took the review of Mr. Bishop's rating outside the "discretionary act exception," since an administrator does not have the discretion to disregard mandatory regulatory commands, and when, third, the Veterans Administration's issuance of the D.V.B. Circular 21-82-9 was not discretionary, but contrary to statute in the first instance.

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## 4. Ruling in the Appellate Court

### A. Substantive Facts Found by the Appellate Court

On August 25, 1989, the United States Court of Appeals for the Ninth Circuit on pages two through three of its Memorandum made the following findings of fact: (1) in 1946, the Veterans Administration determined that Mr. Bishop was entitled to service connected disability benefits, (2) as time went on, Mr. Bishop's condition worsened, (3) in 1969, Mr. Bishop was diagnosed as "totally unemployable, certainly in the profession of law, from this point on," and increased Mr. Bishop's rating to 100%, (4) in 1982, when Mr. Bishop was 67 years old and had been on 100% disability for fourteen years, the Veterans Administration, acting upon the directives of D.V.B. Circular 21-82-9, ordered review of Mr. Bishop's condition and reduced his benefits from 100% to 70%, with the effect that his benefits were reduced from $1,288 per month to $610 per month, (5) Mr. Bishop appealed the rating, (6) thereafter, Mr. Bishop suffered a severe heart attack and the reduction in his benefits, together with the financial burden resulting from his heart attack, led Mr. Bishop to despair that

he would become bankrupt and leave his wife destitute, (7) on May 17, 1984, Mr. Bishop committed suicide, (8) four days later, on May 21, 1984, the Board of Veterans Appeals determined that, the circular notwithstanding, Mr. Bishop was entitled to 100% benefits under Title 38.

## B. Procedural Facts Found by the Appellate Court

The appellate court made the following findings of procedural facts on pages three and four of its Memorandum: (1) Mrs. Bishop, the representative of Mr. Bishop's estate, brought this action against the United States under the Federal Tort Claims Act ("FTCA"), seeking relief for the torts of negligent performance of an undertaking to render services, intentional infliction of emotional harm, wrongful death, and wrongful civil proceedings, (2) the government filed a Motion to Dismiss, or in the Alternative, for Summary Judgment, asserting that the district court lacked jurisdiction under both 38 U.S.C. § 211(a) (1982 & Supp. 1987) and the FTCA's discretionary act exception, 28 U.S.C. § 2680(a) (1982 & Supp. 1987), (3) the district court granted the motion, basing

its decision on both grounds, and dismissed the action, (4) the appellate court had *de novo* review.

C. **Conclusions of Law by the Appellate Court**

On pages four through six of its Memorandum, the appellate court made the following conclusions of law: (1) Mrs. Bishop does not challenge a benefits decision of the Veterans Administration, (2)

> "Section 2680(a) sets forth the FTCA's discretionary act exception:
>
> > The provisions of this chapter and section 1346(b) of this title shall not apply to ---
> >
> > (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.
>
> 28 U.S.C. § 2680(a). Thus, if the Administrator can show either that he was acting under a statute or regulation and was exercising due care, or that he was performing a discretionary function, however negligently, a remedy in tort is not available against him. *Mitchell v. United States*, 787 F.2d 466, 468 (9th Cir. 1986)(discretionary act exception applies regardless of whether the discretion was abused), *cert. denied*, 108 S.Ct. 163 (1987).
>
> "If the action of the Administrator at issue here is his promulgation of the circular, then the discretionary act exception fully impedes a suit against him. *Dalehite v. United States*, 346 U.S. 15, 43

(1953)(adoption of regulations by a government agency is 'classically within the exception' to the FTCA); *Baie v. Secretary of Defense*, 784 F.2d 1376 (9th Cir.)(FTCA's discretionary act exception bars jurisdiction where claim is attempt to test legality of a rule or regulation through the medium of a tort suit)(citing legislative history), *cert. denied*, 479 U.S. 823 (1986).

"The Administrator also claims protection under the 'action under statute or regulation' exception contained in section 2680(a). This argument appears to address the theory that the alleged tortious action of the Administrator is action under the circular, rather than the promulgation of the circular.

"To refute this argument, Bishop makes two assertions: First, since the promulgation of the circular did not meet the requirements of the Administrative Procedures Act, 5 U.S.C. § 553, it did not have legal efficacy. Second, the circular could not have been 'law' because its terms contradicted Regulations, published in the Code of Federal Regulations, governing the Administrator's actions.

"The arguments of both parties miss the point that the tort involved here necessarily inheres in the promulgation of the circular; a suit for action taken under the circular would lie against those agents of the Administrator who actually made decisions pursuant to the circular. None of these agents is named in the suit.

"Because we conclude that the Administrator's actions, however egregious, fall under the FTCA's discretionary action exception, we do not consider the applicability of 38 U.S.C. § 211(a). The tort alleged is not one for which the government has waived its immunity. The district court was therefore without jurisdiction, and properly dismissed the case. *See MacKay v. Pfeil*, 827 F.2d 540, 543 (9th Cir. 1987). Accordingly, we AFFIRM."

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## 5. Questions Raised in Mrs. Bishop's Petition for Rehearing

Mrs. Bishop filed a Petition for Rehearing with Suggestion for Rehearing *en Banc*, asserting that the appellate court erred in, first, overlooking the enactment of the Federal Employees Liability Reform Compensation Act of 1988, Nov. 18, 1988, Pub. L. No. 100-694, § 3, 102 Stat. 4564, and, in ruling that federal employees not only could but must be named as defendants, because the 1988 Act explicitly ruled out naming employees as defendants and erred in, second, overlooking a material point of law, *viz.*, that the circular in controversy in this action was not a law or regulation and issuing an opinion in conflict with other decisions of the appellate court holding that administrators do not have the discretion to violate mandatory measures enacted by Congress and explicitly limiting such discretion of administrators.

## 6. The Appellate Court's Order on Petition for Rehearing

On February 8, 1990, the appellate court panel voted in its Order to amend the Memorandum disposition filed on August 25, 1989, as follows: "On page 6, lines 3-8 are deleted." That deleted text was:

> "The arguments of both parties miss the point that the tort involved here necessarily inheres in the promulgation of the circular; a suit for action taken under the circular would lie against those agents of the Administrator who actually made decisions pursuant to the circular. None of these agents is named in the suit."

## REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The United States Court of Appeals for the Ninth Circuit ruled in this action, applying the "*Dalehite* doctrine," that the issuance and application of D.V.B. Circular 21-82-9, by the Veterans Administration, despite the fact that the circular was inconsistent with the United States Code and the Code of Federal Regulations, was nonetheless a "discretionary function" This decision conflicts with the decision of United States Circuit Court for the District of Columbia Circuit, as well as with the opinion of General Counsel for the Veterans Administration itself, which, in effect, apply the "*Berkowitz* doctrine" to this action. The United States Court of Appeals for the District of Columbia, in *Doe v. Stevens*, 851 F.2d 1457 (D.C. Cir. 1988), ruled that *Berkowitz v. United States*, 486 U.S. 531 (1988), stands for the proposition that the "discretionary function" exception in Section 2680(a) "does not bar claims based upon a governmental departure from clear regulatory

standards." *Doe v. Stevens*, 851 F.2d at 1462. Further, General Counsel for the Veterans Administration also adopts the position taken by the District of Columbia Circuit:

> "Op GC (digested 10-21-87)
> "HELD: A discussion of the Administrator's authority to waive statutes, regulations, and manual provisions.
> "Administrator's Authority to Waive Laws, Regulations, and Manual Provisions
> "1. As requested, we are forwarding the attached white paper on the Administrator's Authority to Waive Laws, Regulations, and Manual Provisions.
> "2. You also asked whether the Administrator could waive the requirement which conditions VA per diem payments for State home aid on veterans who received that care having been eligible for the same services under VA laws. VA's current authority to pay State home aid to States provides: The Administrator shall pay each State at the per diem rate of --
> (1) $7.30 for domiciliary care,
> (2) $17.05 for nursing home care, and
> (3) $15.25 for hospital care, for each veteran receiving such care in a State home, if such veteran is eligible for such care in a Veterans' Administration facility. 38 SCS § 641(a)(emphasis added). We have previously determined that this provision clearly establishes that State home aid for a particular level of care may only be paid on behalf of a veteran who is eligible for the level of care in a VA facility. Unpub. Op GC July 14, 1987 (filed 0-4h Homes-Federal and State); id. Nov 4, 1965; id. May 23, 1960. As explained in the attached white paper, the Administrator may waive laws only when he has statutory authority to do so. We find no authority for the Administrator to waive any part of the State home aid authority in section 641(a).

"WHITE PAPER ADMINISTRATOR'S AUTHORITY TO WAIVE LAWS, REGULATIONS, AND VA MANUAL PROVISIONS

"The Veterans Administration is a creature of statute and thus only has those powers expressly granted by Congress or included by necessary implication from a congressional grant. *See Soriano v. United States*, 494 F2d 681, 683 (9th Cir 1974). As the head of the Veterans Administration, 38 USC § 210(a), the Administrator has only those powers conveyed by Congress. Congress has granted the Administrator authority to waive or deviate in a particular case from the provisions of a number of statutes in certain circumstances. For example, the Administrator may, if necessary to prevent hardship, waive the statutory requirement that the provision of care in Puerto Rico be consistent with the patient load or incidence of furnishing care in the contiguous States. 38 USC § 603(a)(5). Another grant of waiver authority permits the Administrator to provide by regulation for the waiver of any service or payment obligation of a participant in the VA health professional scholarship program in certain circumstances. 38 USC § 4144(d)(2). Other statutory grants of waiver authority can be found in 38 USC §§ 246(e), 1673(d)(1), 1776(d), 1783(d), 1789(c), 1798(c)(1), 1802(b), 1810(g)(5), 3203(b)(1)(C), 4105(a)(8), 4202(3), 5226. Congress has not, however, granted the Administrator general authority to waive the application of laws.

"A discussion of the Administrator's authority to waive VA rules requires a broad overview of the Administrative Procedures Act (APA). The APA sets forth procedures for promulgating rules (rulemaking) and informing the public of existing rules. 5 USC §§ 552-553. The Administrative Procedure Act defines the term 'rule' broadly as the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of

rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing. *Id.* §551(4).

"The rulemaking procedures of the APA require agencies to publish in the Federal Register prior general notice of proposed rulemaking and give the public an opportunity to participate in the rulemaking. 5 USC § 553(b), (c). The APA provides for a number of exceptions to these procedures. *Id.* § 553(a)(1)-(2), (b)(A)(B). For example, the rulemaking procedures need not be used for 'a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.' *Id.* § 553(a)(2)(Emphasis added). In addition, these procedures do not apply to 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.' *Id.* § 553(b)(A). VA policy, however, waives these exceptions by providing that the rulemaking procedures set forth in section 553 will be used in the process of regulatory development unless an exception is authorized by the Administrator or one of his Deputies and concurred in by the General Counsel. 38 CFR § 1.12 (1986). An exception may be recommended when: (a) The proposed regulations consist of interpretive rules, general statements of policy, or rules of Veterans' Administration organization procedure or practice, or (b) when the Veterans' Administration for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. *Id.*

"The APA also establishes procedures to make information available for the guidance of the public. Accordingly, all substantive rules of general applicability and procedural rules affecting the public must, as a minimum be published in the Federal Register. 5 USC § 552(a)(1)(C)-(D). Any amendment, revision, or repeal of such a rule must also be published in the Federal Register. *Id.* § 552(a)(1)(E). The Act pro-

vides that the public cannot be adversely affected by such rules or revisions thereto if the agency does not follow these publication requirements unless those affected have prior actual notice of the rule or revision. *Id.* § 552(a)(1).

"Congress has given the Administrator authority to make and amend all rules and regulations which are necessary or appropriate to carry out the laws administered by the VA and which are consistent with those laws. 38 USC § 210(c)(1). The Administrator does not, however, have general authority to waive published rules and regulations. If he wishes to deviate from the requirements of a rule or regulation, he generally must amend, revise, or repeal it in accordance with provisions of law governing rulemaking, *see* 5 USC § 553; 38 CFR §1.12(1986), and publish it or make it available to the public pursuant to 5 USC § 552(a). Of course, he may amend a rule or regulation to include a waiver provision if this would be consistent with law In addition, some published rules issued by the Administrator include express waiver authority. For example, the Administrator may, in an emergency, waive any provision of VA regulations on the intergovernmental review of VA programs and activities. 38 CFR § 40.13 (1986). In addition, the Administrator may waive the regulatory requirement that lending institutions promptly notify VA of loans made on a veteran's adjusted service certificate. *Id.* § 11.77. Other express regulatory waiver authorities can be found in 38 CFR §§ 0.735-23, 17.612, 21.4005, 36.4220, 36.4275, 36.4280, 36.4315, 36.4317, 36.4319, 36.4345, 36.4600. Finally, the Administrative Procedure Act imposes public notification procedures on other agency issuances. Most VA manual provisions and instructions to staff have not been published in the Federal Register. According to the Administrative Procedure Act: A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if -- (i) it has been indexed and either made available (for public in-

> spection and copying) or published (and copies afforded for sale); or (ii) the party has actual and timely notice of the terms thereof. 5 USC § 552(a)((2)(i)-(ii). Thus, for the Administrator to waive a provision in a staff manual or an instruction to staff that affects a member of the public in a situation where the VA intends to rely on, use, or cite the waiver against a party, the waiver of the provision would have to be indexed and made available for public inspection and copying or the affected party would have to have the requisite prior actual notice of the waiver. Even with prior actual notice to the affected party, there is significant risk that agency action to waive such a 'provision could be challenged and struck down as 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 USC § 706(2)(A). In addition, the Administrator cannot waive manual provisions which are required by law or regulation or which simply restate law or regulation requirements.
>
> "Those routine, nonsubstantive manual provisions which do not affect a member of the public could be waived by the Administrator summarily without public notice. For example, the Administrator could probably waive many internal VA instructions to staff in this fashion. We recommend, however, that any such waiver be in writing." [Emphasis added.]

Opinion of General Counsel of the Veterans Administration (Digested 10-21-87); 1 Veterans Law Reporter 6520-21.

**DISCUSSION**

The United States Court of Appeals for the Ninth Circuit relied upon *Dalehite v. United States*, 346 U.S. 15, 43 (1953)(adoption of regulations by a government agency is "classically within the exception" to the FTCA), when the controlling law should have been *Berkowitz*.

The post-determination of benefits preclusion of judicial review in 38 U.S.C. § 211(a) (1982 & Supp. V 1987)[1] is tied to the pre-determination of benefits consistent with the requirements of 38 U.S.C. § 210(c) (1982). Section 210, in other words, provides the protections Congress wanted to give to veterans in conjunction with the protections section 211(a) took away from veterans. The Veterans Administration is protected by section 211(a) only if the Veterans Administration complies with Section 210.

Section 210 provides that the Veterans Administration (1) can only issue circulars which are "consistent" with its own regulations, and (2) can only issue circulars which include explicit reference to the applicable statutes and regulations which allow the action. The circular in this action did neither. Further, the Veterans Administration also has adopted the policy of complying with the Administrative Procedure Act requirement of publishing in the Federal Register, *see* 38

[1] Plaintiff emphasizes that she does not mean to suggest in any sense that the issue before this Court is an issue under 38 U.S.C. § 211(a), rather than under 28 U.S.C. § 2680(a). The United States Court of Appeals for the Ninth Circuit did not rule on the Section 211(a) issue, but precluded a defense by Defendant under that section in finding that Mrs. Bishop did not challenge a reduction of benefits, because all benefits had been restored, *i.e.*, there was no reduction of benefits to challenge.

C.F.R. § 1.12 (1982). The circular in this action also was not published in the Federal Register.

Section 211(a) provides for the preclusion of judicial review only if the decision of the Veterans Administration is under a statute or regulation providing for benefits. Section 210 explains when a decision is under such a statute or regulation. Thus, a departure from the Congressional dictates of section 210 is not "an adoption of regulations by [the Veterans Administration]" but, rather, is an act outside the limits of the authority given by Congress. By the standards given in section 210 and 38 C.F.R. § 1.12 (1982), D.V.B. Circular 21-82-9 is not a regulation but is, rather, an illegal order which was manifestly inconsistent with existent statutes and regulations. Thus, even apart from the contents or inconsistencies of the circular, the various illegalities which occurred in the promulgation of the circular precluded the circular from being a legal document or a legal circular. That is especially important when the content of the circular was flatly inconsistent with numerous existing statutes and regulations.

However, even if the Veterans Administration had, *arguendo*, complied with section 210 and section 1.12, the fact

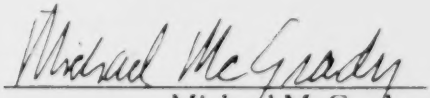
that the circular was manifestly inconsistent with the standards existent in the Veterans Administration's own statutes, rules, and regulations takes this action outside the confines of *Dalehite* and into the confines of *Berkowitz*.

Importantly, the circular was inconsistent with each of the applicable regulations the circular was not only required to be consistent with but also was required to cite, so that the public, if the public had been supplied with notice as required, could have ascertained that the circular was so inconsistent. *See* 38 C.F.R. §§ 1.12 (requirement that the circular be published in the Federal Register), 3.327(b)(2) (requiring that no re-examination of service connected disabilities when (a) the disability, as in this action, is static, (b) when the symptoms, as in this action, have persisted for 5 years or more, (c), where, as in this action, the disability is of such a nature as to be permanent in character, (d) where the veteran, as in this action, is over 55 years of age, (d) when, as in this action, the disability is a prescribed minimum rating), 3.340(a)(1), (2), 3.343(a) (disallowing reduction of 100% unemployability ratings unless there is, contrary to the facts in this action, an examination showing material improvement in the physical or

mental condition), (c) (requiring, contrary to the facts in this action, a showing of "actual employability" by "clear and convincing evidence"), 4.132 (requiring a 100% schedular rating for veterans rated 100% for reasons of unemployability for, as in this action, a psychoneurotic condition).

Plaintiff respectfully submits that the United States Court of Appeals for the District of Columbia and the Veterans Administration's own General Counsel are correct that the *Berkowitz* doctrine, rather than the *Dalehite* doctrine, should have been applied to this action.

Respectfully submitted.



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# APPENDIX

## DECISIONS SOUGHT TO BE REVIEWED

**Opinion of the United States Court of Appeals for the Ninth Circuit (Circuit Court No. 88-4040, August 25, 1989):**

"UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| LAVERNA S. BISHOP personal representative and sole surviving heir for the estate of ALAN H. BISHOP, | ) | No. 88-4040 D.C. No. CV-87-6613-RE |
| Plaintiff-Appellant, | ) | MEMORANDUM |
| v. | ) | |
| UNITED STATES OF AMERICA, | ) | |
| Defendant-Appellee. | ) | |

Appeal from the United States District Court for the District of Oregon
James A. Redden, District Judge, Presiding
Argued and Submitted June 30, 1989
Portland, Oregon

"Before: GOODWIN, Chief Judge, BRUNETTI and O'SCANNLAIN, Circuit Judges.

"The widow of a deceased veteran brought a claim under the Federal Tort Claims Act for damages for alleged injuries to decedent caused by the Veterans' Administration's handling of his case during his lifetime. The veteran's widow appeals the dismissal of her action.

I. FACTS AND PRIOR PROCEEDINGS

"Decedent Alan Bishop served in the Navy during World War II. He was discharged in December of 1944 because he suffered from shell shock. In 1946, the Administrator of the Veterans' Administration ('the Administrator') determined that Mr. Bishop was entitled to service-connected benefits for his condition.

"As time went on, Mr. Bishop's condition worsened. In 1969, following a period of hospitalization, Mr. Bishop was diagnosed as 'totally unemployable, certainly in the profession of law [Mr. Bishop's former profession], from this point on.' His disability rating by this time had been increased to 70%; in 1969, the Administrator increased the rating to 100%.

"In 1982, Mr. Bishop was 67 years old, and had been on 100% disability for 13 years. At that time, the Administrator, acting upon the directives of DVB Circular 21-82-9 ('the circular'), ordered review of Mr. Bishop's condition, and reduced Mr. Bishop's disability rating from 100% to 70%. The effect was that Mr. Bishop's benefits were reduced by half, from $1,288 per month to $610 per month.

"After a hearing, the Rating Board affirmed the reduction. Either while the Board's decision was pending or sometime thereafter, Mr. Bishop suffered a severe heart attack. The reduction in his benefits, together with the financial burden resulting from his heart attack, led Mr. Bishop to despair that he would become bankrupt and leave his wife destitute.

"Mr. Bishop appealed the Rating Board's decision to the Board of Veterans' Appeals (BVA). The BVA's decision was pending when, on May 17, 1984, Mr. Bishop committed suicide. Four days later, on May 21, the BVA determined that, the circular notwithstanding, Mr. Bishop was entitled to 100% benefits under Title 38.

"LaVerna,[1] the represenative of Alan Bishop's estate, brought this action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) & 2671 *et seq.*, seeking relief for the torts of negligent performance of an undertaking to render

services, intentional inflection of emotional harm, wrongful death, and wrongful civil proceedings.

"The government filed a Motion to Dismiss, or in the Alternative, for Summary Judgment, asserting that the district court lacked jurisdiction under both 38 U.S.C. § 211(a) and the FTCA's discretionary act exception, 28 U.S.C. § 2680(a). The district court granted the motion, basing its decision on both grounds, and dismissed the action.

"Although the question whether the district court had jurisdiction to award damages is disputed, this court has jurisdiction under 28 U.S.C. § 1291 and Fed. R. App. P. 4, because the judgment appealed from is final and the notice of appeal was timely. Our review is *de novo*. Baker v. United States, 817 F.2d

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[1] LaVerna Bishop, the actual plaintiff, will be referred to throughout as 'Bishop.' References to Alan Bishop will be to Mr. Bishop.

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560, 562 (9th Cir. 1987), cert. denied, 108 S.Ct. 2845 (1988).

## II. DISCUSSION

"Since Mr. Bishop in fact received all of his benefits posthumously, Bishop does not challenge the Administrator's benefits decision. Bishop instead alleges a tort, basing jurisdiction on the FTCA. Bishop apparently argues that the tort consisted either of the Administrator's decision to act under the circular, the terms of which were contrary to law, or of his initial decision to promulgate that circular.

"In response, the Administrator argues that the district court correctly determined that it did not have the jurisdiction over the claim. As did the district court, the Administrator relies upon both the FTCA and section 211(a) of Title 38. We hold that the FTCA presents a firm obstacle to her suit.

"Section 2680(a) sets forth the FTCA's discretionary act exception:

> 'The provisions of this chapter and section 1346(b) of this title shall not apply to --
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion be abused.'

28 U.S.C. § 2680(a). Thus, if the Administrator can show either that he was acting under a statute or regulation and was exercising due care, or that he was performing a discretionary function, however negligently, a remedy in tort is not available against him. *Mitchell v. United States*, 787 F.2d 466, 468 (9th Cir. 1986)(discretionary act exception applies regardless of whether the discretion was abused), *cert. denied*, 108 S.Ct. 163 (1987).

"If the action of the Administrator at issue here is his promulgation of the circular, then the discretionary act exception fully impedes a suit against him. *Dalehite v. United States*, 346 U.S. 15, 43 (1953)(adoption of regulations by a government agency is 'classically within the exception' to the FTCA); *Baie v. Secretary of Defense*, 784 F.2d 1375, 1376 (9th Cir.)(FTCA's discretionary act exception bars jurisdiction where claim is attempt to test legality of a rule or regulation through the medium of a tort suite)(citing legislative history), *cert. denied*, 479 U.S. 823 (1986).

"The Administrator also claims protection under the 'action under statute or regulation' exception contained in section 2680(a). This argument appears to address the theory that the alleged tortious action of the Administrator is action under the circular, rather than the promulgation of the circular.

"To refute this argument, Bishop makes two assertions: First, since the promulgation of the circular did not meet the requirements of the Administrative

Procedures Act, 4 U.S.C. § 553, it did not have legal efficacy. Second, the circular could not have been 'law' because its terms contradicted Regulations published in the Code of Federal Regulations, governing the Administrator's actions.

"The arguments of both parties miss the point that the tort involved here necessarily inheres in the promulgation of the circular; a suit for action taken under the circular would lie against those agents of the Administrator who actually made decision pursuant to the circular. None of these agents is named in the suit.

"Because we conclude that the Administrator's actions, however egregious, fall under the FTCA's discretionary function exception, we do not consider the applicability of 38 U.S.C. § 211(a). The tort alleged is not one for which the government has waived its immunity. The district court was therefore without jurisdiction and properly dismissed the case. See MacKay v. Pfeil, 827 F.2d 540, 543 (9th Cir. 1987). Accordingly, we **AFFIRM**." [Page 6, lines 3-8, of the Memorandum are emphasized]

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**Order upon Petition for Rehearing and Suggestion for Rehearing *en Banc* (Circuit Court No. 89-4040, February 8, 1990):**

"UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| LAVERNA S. BISHOP personal representative and sole surviving heir for the estate of ALAN H. BISHOP, | ) | No. 88-4040 D.C. No. CV-87-6613-RE |
| Plaintiff-Appellant, | ) | ORDER |
| v. | ) | |
| UNITED STATES OF AMERICA, | ) | |
| Defendant-Appellee. | ) | |

"Before: GOODWIN, Chief Judge, BRUNETTI and O'SCANNLAIN, Circuit Judges.

"The panel has voted to amend the memorandum disposition filed on August 25, 1989 as follows:

"On page 6, lines 3-8 are deleted.

"With the memorandum thus amended, the panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

"The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED."

**OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (Trial Court No. 87-6613-E, July 11, 1988)**

"IN THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| LAVERNA S. BISHOP personal representative and sole surviving heir for the estate of ALAN H. BISHOP, | ) | Civil No. 87-6613-RE |
| Plaintiff, | ) | ORDER |
| v. | ) | |
| UNITED STATES OF AMERICA, | ) | |
| Defendant. | ) | |

"REDDEN, Judge:

"IT IS ORDERED that defendant's motion for summary judgment (#7) is GRANTED.

"Dated this 11 day of July, 1988.

James A. Redden
United States District Judge

"The amended complaint in this action was filed on March 16, 1988, by Laverna Bishop, the personal representative and sole surviving heir of Alan Bishop. The amended complaint alleges negligent performance of an undertaking to render services; intentional infliction of emotional harm; wrongful death; and wrongful civil proceedings.

"The government has filed a motion to dismiss, or in the alternative, for summary judgment. It contends that plaintiff's action is precluded by 38 U.S.C. § 211(a) and the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a).

"38 U.S.C. § 211(a) provides:

> "except as provided in sections 784, 1661, 1761, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such action.

"The government has established that plaintiff's claim in large part questions the merits of the Veterans' Administration's determination of entitlement and that § 211 specifically prevents review of the merits of such a decision. To the extent the plaintiff's argument is that the decision on the merits was improper, that falls within the administration of the benefit provisions and is foreclosed by§ 211(a).

"The government also takes the position that plaintiff's claim is barred by the discretionary function exception. 28 U.S.C. § 2680(a) provides that any claims

> "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion be abused

"is excepted from the Federal Tort Claims Act (FTCA). The Supreme Court has described those acts which come within the exception as follows:

> "First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.... Thus, the basic inquiry concerning the application of the discretionary function exception is whether the chal-

> lenged acts of a Government employee ... are of the nature and quality that Congress intended to shield from tort liability....
>
> Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of Government acting in its role as a regulator of the conduct of private individuals.

"*United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig),* 467 U.s. 797, 813 (1984). At issue in the instant case is Circular 21-81-9, issued by the Veterans' Administration, which called for review of all unemployability cases and Alan Bishop's rerating of disability made pursuant to that circular. The government contends that issuance of this circular was a discretionary act. I agree. To the extent that the plaintiff's argument is aimed at the creation of the circular, such a decision involves a discretionary act on the part of the Veterans' Administration.

"Summary judgment is appropriate if the court finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). There is no genuine issue of material fact where the nonmoving party fails to "establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2553 (1986).

"The government has established that this court lacks jurisdiction to review the Veterans' Administration's decisions at issue her by virtue of § 211(a) or the discretionary function exception. There is no genuine issue of material fact and the government is entitled to judgment as a matter of law. Therefore, I grant the government's motion for summary judgment and dismiss this action accordingly.

"Dated this 11th day of July, 1988.

James A. Redden
United States District Judge

## CONSTITUTION

U.S. Const. amend. V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

## STATUTES

28 U.S.C. § 2680(a) (1982 & Supp. V 1987):

> "The provisions of this chapter and section 1346(b) of this title shall not apply to -- (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion be abused."

38 U.S.C. § 210(c)(1) (1982):

> "The Administrator has authority to make all rules and regulations which are necessary or appropriate to carry out the laws administered by the Veterans' Administration and are consistent therewith, including regulations with respect to the nature and extent of proofs and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws, the forms of application by claimants under such laws, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards. Any rules, regulations, guidelines, or other published interpretations or orders, or any amendment thereto, issued pursuant to the authority granted by this subsection or any other provision of this title shall contain, immediately following each substantive provision of such rules, regulations, or guidelines, or other published interpretations or orders, or any amendment thereto, citations to the particular section or sections of statutory law or other legal authority upon which such rule, regulation, guideline, or other published interpretation or order is based, or, in the case of any amendment thereto, upon which such amendment and the rule, regulation, guideline, interpretation or order being amended is based."

38 U.S.C. § 359 (1981):

> "Service connection for any disability or death granted under this title which has been in force for ten or more years shall not be severed on or after January 1, 1962, except upon a showing that the original grant of service connection was based on fraud or it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge. The mentioned period shall be computed from the date determined by the Administrator as the date on which the status commenced for rating purposes."

## REGULATIONS

38 C.F.R. § 1.12 (1988):

> "It is the policy of the Department of Veterans Affairs to afford the public general notice, published in the Federal Register, of proposed regulatory development, and an opportunity to participate in the regulatory development in accordance with the provisions of the Administrative Procedure Act (APA). All written comments received will be available for public inspection. Exceptions to the policy of permitting public participation in the regulatory development may be authorized by the Secretary or one of the Secretary's deputies if adequately justified and concurred in by General Counsel. Such exceptions, unless public comment is required by statute, may be recommended when: (a) The proposed regulations consist of interpretative rules, general statements of policy, or rules of Department of Veterans Affairs organization procedure or practice, or (b) when the Department of Veterans Affairs for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

38 C.F.R. § 3.327(b)(2) (1988):

> "In service connected cases, no reexamination will be scheduled (i) when the disability is established as static; (ii) when the findings and symptoms are shown by examinations scheduled in paragraph (b)(2)(i) of this section or other examinations and hospital reports to have persisted without material improvement for a period of 5 years or more; (iii) where the disability from disease is permanent in character and of such a nature that there is no likelihood of improvement; (iv) in cases of veterans over 55 years of age, except under unusual circumstances; (v) when the rating is a prescribed scheduled minimum rating; or (vi) where a

combined disability evaluation would not be affected if the future examination should result in reduced evaluation for one or more conditions."

38 C.F.R. § 3.343(a) (1988):

> "Total disability ratings, when warranted by the severity of the condition and not granted purely because of hospital, surgical, or home treatment, or individual unemployability will not be reduced, in the absence of clear error, without examination showing material improvement in physical or mental condition."

38 C.F.R. § 3.343(c) (1988):

> "(1) in reducing a 100% service connected disability based on individual unemployability ... caution must be exercised in such a determination that actual employability is established by clear and convincing evidence."

38 C.F.R. § 4.132 (1988):

> "General Rating Formula for Psychoneurotic Disorders:
>
> > "The attitudes of all contacts except the most intimate are so adversely affected as to result in virtual isolation in the community. Totally incapacitating psycho-neurotic symptoms bordering on gross repudiation of reality with disturbed thought or behavioral processes associated with almost all daily activities such as phantasy, confusion, panic and explosions of agressive [sic] energy resulting in profound retreat from mature behavior. Demonstrably unable to obtain or retain employment. ...."

## CIRCULAR

Department of Veterans Benefits Circular 21-82-9 (May 10, 1982):

"REVIEW OF INDIVIDUAL UNEMPLOYABILITY CASES

"1. Purpose. A review of compensation cases involving veterans under age 60 receiving individual unemployability was conducted in 1980. That review resulted in a substantial number of mental disorder cases being assigned a schedular 100-percent disability evaluation and revealed several questionable or erroneous grants of individual unemployability. As a result, a review of the compensation cases involving individual unemployability of veterans age 60 and over in 1980 is required.

"2. General. The cases of veterans who are in receipt of compensation, rated unemployable, and who were age 60 or over in 1980, are subject to review under the provisions of this circular.

"a. VA Form 20-8270, C&P Master Record - Audit Writeout, with message code 899, COMP/UNEMP REVIEW, will be generated approximately July 1, 1982, for each veteran whose master record contains Employability Code '2' and who meets the requirements mentioned above. Corresponding claims folders will be pulled and routed to the rating board for review as required by paragraph 3.

"b. A VA Form 20-8270, message code 899, COMP/UNEMP REVIEW, will also be generated for each compensation case containing both an Employability Code '2' and invalid birth data. However, only the cases of veterans not subject to the prior review are subject to this review. Therefore, cases selected on the basis of invalid birth data will be checked for proper control for unemployability review, if appropriate, routed for correction of the birth data, recorded for reporting purposes, and returned to the

file bank if the facts demonstrate that the veteran had not attained the age of 60 in 1980. The rating board will accept jurisdiction of those cases otherwise properly referred for review.

"3. Rating Board Review. The Rating activity is responsible for determining the proper action required on claims subject to review.

"a. Veterans who have been rated entitled to and receiving benefits at the total rate for 20 or more years are afforded protection under VAR 1951 and their cases will be processed as follows:

"(1) If the veteran's unemployability is due to a service-connected mental disorder, VA Form 21-6796, Rating Decision, will be prepared to assign a 100-percent schedular evaluation for the disability.

"(2) In other protected cases the current ratings will be annotated as follows: 'Rating reviewed under D.V.B. Circular 21-82-9, EP 680.' The ratings will be initialed and dated by the rating board member.

"(3) Upon completion of the action required under subparagraph (1) or (2) above, the claims folders will be referred to Authorization for reporting purposes.

"b. Each remaining rating will be reviewed thoroughly for the appropriateness of individual evaluation(s) (diagnostic code(s) and percentage(s)), combined degree and whether the medical and employment evidence was adequate to support the finding of individual employability. (See D.V.B. Circular 21-81-11.)

"(1) Any condition(s) evaluated under the obsolete diagnostic code(s) will be reevaluated under a code(s) in the current Schedule for Rating Disabilities.

"(2) The following guidelines are for application during the review:

"(a) No development is to be undertaken if the evidence was adequate to support the finding of individual unemployability at the time of the grant, unless subsequent evidence is of record establishing a reasonable probability the veteran is employable.

"(b) A 100-percent schedular evaluation will be assigned if unemployability is directly attributable to

a service-connected mental disorder as unemployability is a criterion for the total evaluation.

"(c) Determinations as to entitlement to receive benefits because of individual unemployability depend solely upon employment impairment caused by the service-connected disability(ies).

"(d) Age may not be considered in arriving at determinations of unemployability.

"(e) The issue of unemployability is not appropriate in any case in which a temporary total evaluation under paragraph 28, 29, or 30 is for consideration. (See M21-1, ch. 53.)

"c. There should be no reluctance to undertake development of unprotected cases if the review indicated that the rating granting individual unemployability was clearly erroneous. The Rating activity is responsible for determinations regarding requests for addition evidence.

"(1) The necessary development for employment evidence must be made on a case-by-case basis following review of the claims folder using criteria set forth in D.V.B. Circular 21-81-11.

"(2) If medical evidence is needed, an 'at once' examination will be requested.

"(3) The reason any pertinent evidence was not requested will be given in the discussion portion of the rating narrative.

"d. Reduced evaluations are subject to the provisions of VAR 1105(A) and/or 1105(E). (See VAR 1343(C) also.)

"(1) Reduction to schedular evaluations due to failure to return employment questionnaire will be effective as of the date of last payment in accordance with the provisions of VAR 1501(F).

"(2) Reductions for failure to report for an examination will be in accordance with the provisions of VAR 1501(H). (See VAR 1655.)

"e. A rating decision will be prepared for each case reviewed according to this circular unless the rating was protected under VAR 1951 and the veteran was unemployable due to other than a service-connected mental disorder. Rating 'jurisdiction' will be

cited as 'Unemployability Review, D.V.B. Circular 21-82-9.'

"(1) A VA Form 21-6789, Deferred or Confirmed Rating Decision, will be completed if the existing rating has been confirmed.

"(2) A new rating decision will be prepared on VA Form 21-6796, for each case requiring an essential change to the existing rating decision.

"4. Action Based on Rating. Completed ratings will be returned to Authorization for reporting purposes and the following actions:

"a. An award will be prepared if the rating will change the veteran's pay status. The veteran or fiduciary will be advised of each change which affects payment of VA benefits.

"b. The rating data in the master record will be updated if the rating will change any disability evaluation(s) or individual unemployability status.

"c. Statistical irregularities in the master record which were detected during the course of this review will be referred for purposes of correction.

"5. Reports. A report will be prepared in accordance with the format provided in exhibit A and will be submitted to the Field Director (201/213B) 4 months from the date of issuance of the VA Forms 20-8270. An interim report may be submitted in the event that action is pending for any cases at the time the report is due. A report showing the final disposition of all cases will be submitted not more than 7 months from the date of issuance of the VA Forms 20-8270. RCS 21-96-S is assigned to this one-time report.

"6. Disposal of Message Codes. VA Forms 20-8270, message code 899, COMP/UNEMP REVIEW, will be disposed of in accordance with Records Control Schedule VB-1, part I, item No. 13-052.2, at the completion of the review.

"7. Operating Performance.

"a. End product code 680 will be assigned for each case reviewed as a result of this circular.

"b. End product code 930 will be assigned for actions such as corrections to birth data fields.

"8. RESCISSION: This circular is rescinded July 1, 1983.

[Signed]
DOROTHY L. STARBUCK
Chief Benefits Director

Distribution: CO: RPC 2901
FD FLD: RPC 2068, plus VBC, 1 each
EX: ASO and AR (included in RPC 2068)"

## OPINION OF GENERAL COUNSEL FOR THE VETERANS ADMINISTRATION

Opinion of General Counsel of the Veterans Administration

(Digested 10-21-87); 1 Veterans Law Reporter 6520-21:

"Op GC (digested 10-21-87)

"HELD: A discussion of the Administrator's authority to waive statutes, regulations, and manual provisions.

"Administrator's Authority to Waive Laws, Regulations, and Manual Provisions

"1. As requested, we are forwarding the attached white paper on the Administrator's Authority to Waive Laws, Regulations, and Manual Provisions.

"2. You also asked whether the Administrator could waive the requirement which conditions VA per diem payments for State home aid on veterans who received that care having been eligible for the same services under VA laws. VA's current authority to pay State home aid to States provides: The Administrator shall pay each State at the per diem rate of --

(1) $7.30 for domiciliary care,

(2) $17.05 for nursing home care, and

(3) $15.25 for hospital care, for each veteran receiving such care in a State home, if such veteran is eligible for such care in a Veterans' Administration facility. 38 SCS § 641(a)(emphasis added). We have previously determined that this provision clearly establishes that State home aid for a particular level of care may only be paid on behalf of a veteran who is eligible

for the level of care in a VA facility. Unpub. Op GC July 14, 1987 (filed 0-4h Homes-Federal and State); id. Nov 4, 1965; id. May 23, 1960. As explained in the attached white paper, the Administrator may waive laws only when he has statutory authority to do so. We find no authority for the Administrator to waive any part of the State home aid authority in section 641(a).

"WHITE PAPER ADMINISTRATOR'S AUTHORITY TO WAIVE LAWS, REGULATIONS, AND VA MANUAL PROVISIONS

"The Veterans Administration is a creature of statute and thus only has those powers expressly granted by Congress or included by necessary implication from a congressional grant. *See Soriano v. United States*, 494 F2d 681, 683 (9th Cir 1974). As the head of the Veterans Administration, 38 USC § 210(a), the Administrator has only those powers conveyed by Congress. Congress has granted the Administrator authority to waive or deviate in a particular case from the provisions of a number of statutes in certain circumstances. For example, the Administrator may, if necessary to prevent hardship, waive the statutory requirement that the provision of care in Puerto Rico be consistent with the patient load or incidence of furnishing care in the contiguous States. 38 USC § 603(a)(5). Another grant of waiver authority permits the Administrator to provide by regulation for the waiver of any service or payment obligation of a participant in the VA health professional scholarship program in certain circumstances. 38 USC § 4144(d)(2). Other statutory grants of waiver authority can be found in 38 USC §§ 246(e), 1673(d)(1), 1776(d), 1783(d), 1789(c), 1798(c)(1), 1802(b), 1810(g)(5), 3203(b)(1)(C), 4105(a)(8), 4202(3), 5226. Congress has not, however, granted the Administrator general authority to waive the application of laws.

"A discussion of the Administrator's authority to waive VA rules requires a broad overview of the Administrative Procedures Act (APA). The APA sets

forth procedures for promulgating rules (rulemaking) and informing the public of existing rules. 5 USC §§ 552-553. The Administrative Procedure Act defines the term 'rule' broadly as the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing. *Id.* §551(4).

"The rulemaking procedures of the APA require agencies to publish in the Federal Register prior general notice of proposed rulemaking and give the public an opportunity to participate in the rulemaking. 5 USC § 553(b), (c). The APA provides for a number of exceptions to these procedures. *Id.* § 553(a)(1)-(2), (b)(A)(B). For example, the rulemaking procedures need not be used for 'a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.' *Id.* § 553(a)(2)(Emphasis added). In addition, these procedures do not apply to 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.' *Id.* § 553(b)(A). VA policy, however, waives these exceptions by providing that the rulemaking procedures set forth in section 553 will be used in the process of regulatory development unless an exception is authorized by the Administrator or one of his Deputies and concurred in by the General Counsel. 38 CFR § 1.12 (1986). An exception may be recommended when: (a) The proposed regulations consist of interpretive rules, general statements of policy, or rules of Veterans' Administration organization procedure or practice, or (b) when the Veterans' Administration for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon

are impracticable, unnecessary, or contrary to the public interest. *Id.*

"The APA also establishes procedures to make information available for the guidance of the public. Accordingly, all substantive rules of general applicability and procedural rules affecting the public must, as a minimum be published in the Federal Register. 5 USC § 552(a)(1)(C)-(D). Any amendment, revision, or repeal of such a rule must also be published in the Federal Register. *Id.* § 552(a)(1)(E). The Act provides that the public cannot be adversely affected by such rules or revisions thereto if the agency does not follow these publication requirements unless those affected have prior actual notice of the rule or revision. *Id.* § 552(a)(1).

"Congress has given the Administrator authority to make and amend all rules and regulations which are necessary or appropriate to carry out the laws administered by the VA and which are consistent with those laws. 38 USC § 210(c)(1). The Administrator does not, however, have general authority to waive published rules and regulations. If he wishes to deviate from the requirements of a rule or regulation, he generally must amend, revise, or repeal it in accordance with provisions of law governing rulemaking, *see* 5 USC § 553; 38 CFR §1.12(1986), and publish it or make it available to the public pursuant to 5 USC § 552(a). Of course, he may amend a rule or regulation to include a waiver provision if this would be consistent with law In addition, some published rules issued by the Administrator include express waiver authority. For example, the Administrator may, in an emergency, waive any provision of VA regulations on the intergovernmental review of VA programs and activities. 38 CFR § 40.13 (1986). In addition, the Administrator may waive the regulatory requirement that lending institutions promptly notify VA of loans made on a veteran's adjusted service certificate. *Id.* § 11.77. Other express regulatory waiver authorities can be found in 38 CFR §§ 0.735-23, 17.612, 21.4005, 36.4220, 36.4275, 36.4280, 36.4315, 36.4317, 36.4319, 36.4345, 36.4600. Finally, the Administra-

tive Procedure Act imposes public notification procedures on other agency issuances. Most VA manual provisions and instructions to staff have not been published in the Federal Register. According to the Administrative Procedure Act: A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if -- (i) it has been indexed and either made available (for public inspection and copying) or published (and copies afforded for sale); or (ii) the party has actual and timely notice of the terms thereof. 5 USC § 552(a)((2)(i)-(ii). Thus, for the Administrator to waive a provision in a staff manual or an instruction to staff that affects a member of the public in a situation where the VA intends to rely on, use, or cite the waiver against a party, the waiver of the provision would have to be indexed and made available for public inspection and copying or the affected party would have to have the requisite prior actual notice of the waiver. Even with prior actual notice to the affected party, there is significant risk that agency action to waive such a 'provision could be challenged and struck down as 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 USC § 706(2)(A). In addition, the Administrator cannot waive manual provisions which are required by law or regulation or which simply restate law or regulation requirements.

"Those routine, nonsubstantive manual provisions which do not affect a member of the public could be waived by the Administrator summarily without public notice. For example, the Administrator could probably waive many internal VA instructions to staff in this fashion. We recommend, however, that any such waiver be in writing." [Emphasis added.]

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1744

# In the Supreme Court of the United States

OCTOBER TERM, 1990

LAVERNA S. BISHOP, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

## QUESTION PRESENTED

Whether the decision of the Administrator of the Veterans Administration to review certain veterans' disability cases is within the discretionary function exception of the Federal Tort Claims Act.

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# In the Supreme Court of the United States

OCTOBER TERM, 1990

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---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) and the order of the district court (Pet. App. 7-9) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 25, 1989. A petition for rehearing was denied on February 8, 1990. Pet. App. 6. The petition for a writ of certiorari was filed on May 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Alan H. Bishop served in the United States Navy during World War II and was honorably discharged in

December 1944 due to post-traumatic stress syndrome, or shell shock. In 1946, the Administrator of the Veterans Administration (now the Department of Veterans Affairs) determined that Bishop's condition was service-connected, and that Bishop therefore was eligible for VA disability benefits.[1] In September 1969, the VA rated Bishop's psychoneurosis as 70% disabling. In December 1969, Bishop was determined to be individually unemployable and thus entitled to payment of compensation at the 100% rate notwithstanding his 70% "schedular" rating. See 38 C.F.R. 4.16 (providing that a total disability rating for compensation may be assigned where a disability is ratable at 60% or more according to the VA's disability rating schedule, and the individual is unable to secure employment as a result of a service-connected disability).

In 1982, the Administrator conducted an unemployability review of Bishop's case pursuant to Department of Veterans Benefits Circular 21-82-9 (Circular).[2] The Circular directed VA officials to review the cases of veterans who were receiving compensation, had been rated unemployable, and were 60 years old or older in 1980. Pet. App. 15. Upon a review of Bishop's case that included an interview by a VA examiner, a social survey, and a medical examination, the rating board determined that Bishop's neurosis did not render him completely unemployable and, accordingly, reduced his rating for compensation purposes from 100% to 70%.

Bishop appealed the rating decision to the Board of Veterans Appeals. On May 17, 1984, while his appeal was

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[1] The VA's procedures for awarding service-connected death or disability benefits are described in *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 309-311 (1985).

[2] Circular 21-82-9 is reproduced at Pet. App. 15-19.

pending, Bishop committed suicide. On May 21, 1984, the Board issued a decision reinstating Bishop's rating as individually unemployable. The Board concluded that, although Bishop's depressive neurosis did not warrant a disability rating in excess of 70%, his condition precluded him from engaging in substantially gainful employment. On October 11, 1984, the Administrator determined that Bishop's suicide was a result of his psychoneurosis and therefore was service-connected.

2. Petitioner, Bishop's widow and personal representative, brought an action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for injuries to her husband allegedly caused by the VA's review of his case. Petitioner's amended complaint sought damages for negligent performance of an undertaking to render services, intentional infliction of emotional harm, wrongful death, and wrongful civil proceedings. The United States moved to dismiss, or in the alternative for summary judgment, arguing that the action was barred by the discretionary function exception of the FTCA, 28 U.S.C. 2680(a),[3] as well as by 38 U.S.C. 211(a)(1).[4]

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[3] Section 2680(a), Title 28, U.S.C, provides:

> The provisions of [the FTCA] shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such a statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

[4] Section 211(a)(1) of Title 38, as amended, provides, in part:

> The Administrator shall decide all questions of law and fact necessary to a decision by the Administrator under a law that affects the provision of benefits by the Administrator to veterans or the dependents or survivors of veterans. Subject to [certain enumerated exceptions], the decision of the Administrator as to

The district court dismissed the action for want of jurisdiction, holding that petitioner's "claim in large part questions the merits of the Veterans' Administration's determination of entitlement and * * * § 211 [of Title 38] specifically prevents review of the merits of such a decision." Pet. App. 8. The district court also held that, to the extent petitioner's arguments were directed at the issuance of the Circular, "such a decision involves a discretionary act on the part of the Veterans' Administration," and so cannot be the basis of a suit under the FTCA. Pet. App. 9.

3. The court of appeals affirmed. The court observed that petitioner did not challenge the Administrator's benefits decision, because petitioner "in fact received all of his benefits posthumously." Pet. App. 3. Petitioner instead "apparently argue[d] that the tort consisted either of the Administrator's decision to act under the circular, * * * or of his initial decision to promulgate that circular." *Ibid.* The court of appeals held that, under either theory, the discretionary function exception "present[ed] a firm obstacle to [petitioner's] suit." *Ibid.*

As to the contention that the Administrator's decision to promulgate the Circular gave rise to a cause of action under the FTCA, the court of appeals, relying on *Dalehite* v. *United States*, 346 U.S. 15, 43 (1953), held that "the discretionary act exception fully impedes a suit." Pet. App. 4. As to the contention that the Administrator's action under the Circular violated the FTCA, the court of appeals noted that Section 2680(a) excepts "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." Pet. App. 4.

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any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

Because the court of appeals held that petitioner's action was barred by the discretionary function exception, it had no occasion to consider whether 38 U.S.C. 211(a)(1) also barred the suit. Pet. App. 5.

## ARGUMENT

The court of appeals has correctly decided a narrow issue in a way that does not conflict with any decision of this Court or any other court of appeals. In addition, the Circular expired in July 1983 (Pet. App. 19), and therefore presents no question of continuing importance. Consequently, this case does not warrant further review.

1. Petitioner's action is barred by the discretionary function exception of the FTCA. As this Court explained in *Dalehite*,

> [T]he "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

346 U.S. at 35-36 (footnote omitted). See also *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). Plainly, the Administrator's decision to allocate the VA's limited resources to review of a specified category of veterans' disability cases is precisely the kind of discretionary planning or scheduling that falls within the exception of Section 2680(a).

Petitioner nevertheless contends (Pet. 36-37) that the court of appeals' decision is contrary to this Court's decision in

*Berkovitz* v. *United States*, 486 U.S. 531 (1988). *Berkovitz* held that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because in such circumstances federal officials have no discretion to exercise. *Id.* at 536-537. Petitioner failed to cite *Berkovitz* to the court of appeals; thus it is not surprising that the court of appeals' opinion does not discuss the case. And, contrary to petitioner's contentions, there is no federal statute, regulation, or policy that deprived the Administrator of discretion to promulgate the Circular or to review Bishop's case.

2. Petitioner asserts (Pet. 37) that the Circular did not comply with 38 U.S.C. 210(c)(1), which requires that "[a]ny rules, regulations, guidelines, or other published interpretations or orders [issued under Title 38] shall contain, immediately following each substantive provision * * *, citations to the particular section or sections of statutory law or other legal authority upon which such rule * * * is based." Petitioner's assertion is incorrect. In fact, the Circular refers to several VA regulations, circulars, and forms. See Pet. App. 15-18. In addition, the Circular contained no "substantive" provisions altering the terms or conditions of eligibility for benefits, but merely directed VA officials to review a specified category of cases under existing substantive provisions.[5]

Petitioner next contends (Pet. 38-39) that the Administrator was required by 38 C.F.R. 1.12 to provide public notice and an opportunity for comment by publishing the

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[5] The courts of appeals have held, in the context of the Administrative Procedure Act, that VA circulars are not substantive law. See, *e.g.*, *First Family Mortgage Corp.* v. *Earnest*, 851 F.2d 843, 844-845 (6th Cir. 1988) (circulars are not "substantive regulations"); *Gatter* v. *Nimmo*, 672 F.2d 343, 347 (3d Cir. 1982) (circulars are "non-substantive rules").

Circular in the *Federal Register*. But the Circular was not a "regulation" subject to Section 1.12, see note 5 *supra*, and in any event fell within the authorized exceptions to the notice-and-comment policy.[6]

In addition, petitioner's arguments based on these asserted procedural irregularities fail for a more basic reason. Such arguments do not show that the Administrator lacked discretion to promulgate the Circular, but, at most, that he failed to follow the correct procedures in exercising his discretion. Congress assuredly did not intend to permit such procedural contentions to be litigated in the context of a tort action for damages under the FTCA. "It is neither desirable nor intended that * * * the legality of regulations * * * should be tested through the medium of a damage suit for tort." *Varig Airlines*, 467 U.S. at 809-810 (quoting *Hearings on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary*, 77th Cong., 2d Sess. 28, 33 (1942) (statement of Assistant Attorney General Francis M. Shea)).

Petitioner also contends (Pet. 39-40) that the Circular violated certain substantive regulations of the VA. But none of the regulations cited by petitioner deprived the Administrator of discretion to issue the Circular, or to review petitioner's case. Thus, 38 C.F.R. 3.327, relied on by petitioner (Pet. 39), is not a blanket prohibition against reexamination. While subsection (b) provides that re-

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[6] Section 1.12, Title 38 C.F.R., provides, in part:

> It is the policy of the Veterans' Administration to afford the public general notice, published in the *Federal Register*, of proposed regulatory development, and an opportunity to participate in the regulatory development in accordance with the provisions of the Administrative Procedure Act (APA). All written comments received will be available for public inspection. Exceptions to the policy of permitting public participation in the regulatory development may be authorized * * * when: (a) the proposed regulations consist of interpretative rules, general statements of policy, or rules of [VA] organization procedure or practice * * *.

examinations will not be scheduled in certain circumstances, subsection (d) specifically states that "[t]he policy as to reexaminations will not be construed as modifying in any way the right of rating agencies to request such additional medical opinions, examinations, or periods of hospital observation as may be necessary to furnish complete evidence on which rating decisions will be based." Clearly, the accommodation of these provisions within this statement of policy is a matter calling for the exercise of discretion.[7] Cf. *Tietjen v. United States Veterans Admin.*, 692 F. Supp. 1106, 1109 (D. Ariz. 1988) (deferring to Secretary's discretion), aff'd, 884 F.2d 514 (9th Cir. 1989).

Moreover, contrary to petitioner's assertions (Pet. 39), nothing in the Circular is inconsistent with 38 C.F.R. 3.343(a) (which requires that reduction of a 100% rating for other than individual unemployability be supported by an examination showing "material improvement" in the recipient's physical or mental condition), 38 C.F.R. 3.343(c) (which requires that reduction of a 100% rating based upon individual unemployability be supported by clear and convincing evidence of "actual employability") or 38 C.F.R. 4.132 (the schedule of ratings for mental disorders). Indeed, the Circular provided that "[n]o development is to be undertaken if the evidence was adequate to support the finding of individual unemployability at the time of the grant, unless subsequent evidence is of record establishing a reasonable probability the veteran is employable," but that "[t]here should be no reluctance to undertake development of un-

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[7] To avoid any possible ambiguity, the Secretary has proposed to amend 38 C.F.R. 3.327 to state expressly that "[p]aragraphs (b) and (c) of this section provide general guidelines for requesting reexaminations, but shall not be construed as limiting VA's authority to request reexaminations, or periods of hospital observation, at any time in order to ensure that a disability is accurately rated." 55 Fed. Reg. 4199, 4200 (1990).

protected cases * * * if the rating granting individual unemployability was clearly erroneous."[8] Pet. App. 16-17.

In sum, the Administrator's decision to promulgate Circular 21-82-9 was a discretionary decision, grounded in considerations of public policy, that Congress sought to preclude from being "tested through the medium of a damage suit for tort." *Varig Airlines,* 467 U.S. at 809-810. Accordingly, petitioner's suit under the FTCA was correctly dismissed for want of jurisdiction.[9]

3. Finally, petitioner's claim is also barred by 38 U.S.C. 211(a)(1), which provides that the Administrator's decisions as to all "questions of law and fact necessary to a decision * * * under a law that affects the provision of benefits by the Administrator to veterans or the dependents or survivors of veterans" are not subject to review in any judicial proceeding. In *Johnson* v. *Robison*, 415 U.S. 361 (1974), the Court observed that this provision "would appear to be aimed at review * * * of those decisions of law or fact that arise in the *administration* by the [VA] of a *statute* providing benefits for veterans." *Id.* at 367. The Court recognized that

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[8] Petitioner does not suggest that VA officials negligently misapplied the provisions of the Circular in her husband's case. Thus any claim based on the application of the Circular to Bishop is barred as a "claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. 2680(a).

[9] Contrary to petitioner's contention (Pet. 31), there is no conflict between the court of appeals' decision in this case and the decision of the District of Columbia Circuit in *Doe* v. *Stephens,* 851 F.2d 1457 (1988). In *Stephens*, the District of Columbia Circuit reiterated the *Berkovitz* holding that the discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment, but went on to hold that the plaintiff in that case had cited no regulations violated by the government that "meaningfully cabin[ed] the U.S. Attorney's ordinarily discretionary authority to issue a subpoena." *Id.* at 1462-1463.

the purpose of the no-review clause is two-fold: "(1) to insure that veterans' benefits claims will not burden the courts and the [VA] with expensive and time-consuming litigation, and (2) to insure that the technical and complex determinations and applications of [VA] policy connected with veterans' benefits decisions will be adequately and uniformly made." *Id.* at 370. The Administrator's decision to issue the Circular, and the application of the Circular to Bishop, clearly involved "questions of law and fact" arising in the VA's administration of the veterans' benefit statutes. The language and purpose of Section 211(a)(1) preclude the use of the FTCA as a means of obtaining judicial review of the Administrator's determination in this case, and provide an independent basis for dismissing petitioner's suit.[10] See *Tietjen* v. *United States Veterans Admin.*, 884 F.2d 514, 515 (9th Cir. 1989).

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[10] In 1988, Congress passed the Veterans' Judicial Review Act, Pub. L. No. 100-687, § 101, 102 Stat. 4105, which provides that decisions of the Board of Veterans Appeals may be appealed to a newly-created Article I court, the United States Court of Veterans Appeals (CVA). 38 U.S.C. 4051-4052. Decisions of the CVA are subject to review only in the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 4092. These provisions are not applicable to petitioner's case, since the 1988 legislation applies only to cases in which a "notice of disagreement" was filed on or after November 18, 1988 (see 102 Stat. 4122), and Bishop filed a "notice of disagreement" in January 1983 (Gov't C.A. Br. 3).

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JULY 1990

U.S. GOVERNMENT PRINTING OFFICE 1990—262 203/20027

FILED
AUG 16 1990

No. 89-1744

# In the Supreme Court of the United States

OCTOBER TERM 1990

**LAVERNA S. BISHOP, personal representative and sole surviving heir, for the estate of ALAN H. BISHOP, PETITIONER**

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## REPLY BRIEF FOR PETITIONER

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## QUESTION PRESENTED FOR REVIEW

Whether an application of the Ninth Circuit's interpretation of the *Dalehite* doctrine, *see Dalehite v. United States*, 346 U.S. 15, 43 (1953), or an application of the District of Columbia Circuit's interpretation of the *Berkowitz* doctrine, *see Berkowitz v. United States*, 486 U.S. 531 (1988), is appropriate to determine whether the Veterans Administration's issuance and application of Department of Veterans Benefits Circular 21-82-9 (1982) fell under the "discretionary function" exception to the Federal Tort Claims Act under 28 U.S.C. § 2680(a) (1982 & Supp. V 1987), when the issuance of the circular was contrary to a number of procedural safeguards, enacted by Congress under 38 U.S.C. § 210(c) (1982), restricting the authority of the Veterans Administration to issue such circulars, and when the substantive provisions of the circular were contrary to the Veterans Administration's own rules and regulations under 38 C.F.R. §§ 1.12, 3.327(b)(2), 3.343(a), (c) and 4.132 (1989).

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## TABLE OF AUTHORITIES

### STATUTES

38 U.S.C. § 210(c) (1982) 1, 20, 24, 33, 35, 37, 38

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## REPLY BRIEF FOR PETITIONER

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## DISCUSSION

At least two parts of the United States' brief in opposition are mistaken on important matters. First, the issue is not simply the circular in this case but, rather, the issue is the efficacy of circulars generally in the Veterans Administration context. Thus, the fact that the offending circular in this case has

been rescinded is otiose. Second, the United States' suggestion that somehow the circular in question complied with the dictates of 38 U.S.C § 210(c) is plainly wrong. Additionally, the United States erroneously concludes that Mr. Bishop had a 70% schedular rating in 1969, when in fact the schedular rating was 100%.Brief for the United States in Opposition ["Brief"], p. 2.

The United States, first, contends that "the Circular expired in July 1983 ..., and therefore presents no question of continuing importance." Brief, p. 5. The question, however, whether a circular, any circular, which is not only contrary to substantive statute and regulations but also does not follow the requisite procedural demands of the United States Code can be saved under the rubric of the "discretionary function" exception of the Tort Claims Act remains a viable and important question, and a question upon which the circuits do not agree.

The United States, second, contends that (1) the circular in question "refers to several VA regulations, circulars, and forms" and that (2) "the Circular contained no 'substantive' provisions altering the terms or conditions of eligibility for

benefits...." Brief, p. 6. Both contentions are seriously and obviously mistaken.

First, the circular in question must, according to 38 U.S.C. § 210(c), contain "citations to the particular section or sections of statutory law or other legal authority upon which such rule ... is based." The circular, despite the United States' contention to the contrary does not include such citations. Citations to other circulars and such obviously does not comply with this congressional requisite. Otherwise, of course, the circular could merely cite itself. That sort of patent bootstraping does not comply.

Second, the suggestion that the circular in question does not assert anything "substantive" is ridiculous. The circular completely changes the burden of proof and the conditions under which a veteran can have his or her benefits reduced. That is substantive, if anything is substantive.

Lastly, the United States' Brief contends that Mr. Bishop had but a 70% schedular rating. The Veterans Administration, toward the end of Mr. Bishop's life, treated his rating as if it were 70% schedular, however, a review of the record shows that not only did Mr. Bishop receive a 100%

schedular rating in 1969 but also that unemployability is part of the schedular rating for psychoneurotic claims, so that a 100% unemployability and a 100% schedular rating, for psychoneurotic claims, are in fact the same.

## CITATION OF AUTHORITIES

### STATUTES

38 U.S.C. § 210(c) (1982)

Respectfully submitted,

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